SUPREME COURT, U. S.

No. 133

APR 11 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

RUBY KOLOD, WILLIE ISRAEL ALDERMAN, and
FELIX ANTONIO ALDERISIO, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

ON MOTION TO MODIFY THE ORDER OF THE COURT

BRIEF FOR PETITIONERS

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
PETER R. TAFT
MICHAEL E. TIGAR
1000 Hill Building
Washington, D.C. 20006

Counsel for Petitioners

Of Counsel:

WILLIAM P. JOHNSON
DONALD L. GIACOMINI
Security Life Building
Denver, Colorado 80202

W. H. ERICKSON
First National Bank Building
Denver, Colorado 80202

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX

Statement of the Case 1
I. The Fourth and Fifth Amendments Demand Disclosure . . 3
II. The Proposed Hearing Procedure Is Constitutionally Defective 7
A. Introduction 7
B. The Constitutional Mandate of Adversary Inquiry . 12
III. No Countervailing Need for Secrecy 14
IV. What Kind of Hearing? 17
Conclusion 20

TABLE OF AUTHORITIES

Attorney General v. W.E.B. DuBois Clubs of America, No. 127-66 (S.A.C.B.) 5
Battle v. United States, 345 F.2d 438 (D.C. Cir. 1965) 19
Berger v. New York, 388 U.S. 41 (1967) 4
Brinegar v. United States, 338 U.S. 160 (1949) 6
Campbell v. Eastland, 307 F.2d 478, 486 (5th Cir. 1962) 16
Clewis v. Texas, 386 U.S. 707, 712 n. 8 (1967) 3
Costello v. United States, 350 U.S. 359 (1956) 18
Dennis v. United States, 384 U.S. 855, 875 (1966) 14, 16, 17
DiBella v. United States, 369 U.S. 121, 131 (1961) 12
Douglas v. Alabama, 380 U.S. 415 (1965) 13
Garrett Biblical Institute v. American University, 163 F.2d 265 (D.C. Cir. 1947) 20
Holland v. United States, 348 U.S. 121 (1954) 18
In Re Oliver, 333 U.S. 286 (1948) 13
Irvine v. California, 347 U.S. 128 (1954) 4
Ivanov v. United States, No. 885, October Term 1967 19
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 12

Kolod v. United States, 390 U.S. 136 (1968) 2, 19

Lambeck v. United States Shipping Bd. Emer. Fleet Corp., 9 F.2d 558, 559 (2d Cir. 1925) 13

McGarry v. United States, No. 1184, October Term 1967, U.S. Supreme Court 11

Mapp v. Ohio, 367 U.S. 643 (1961) 4

Olmstead v. United States, 277 U.S. 438 (1928) 4, 5, 21

Palermo v. United States, 360 U.S. 343 (1959) 16

People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959) 3

Pointer v. Texas, 380 U.S. 400 (1965) 13

Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962) 20

Roviaro v. United States, 353 U.S. 53 (1957) 15

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944) 20

Silverman v. United States, 365 U.S. 505 (1961) 4

Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965) 8

Stanford v. Texas, 379 U.S. 476 (1965) 5

Tinkle v. United States, 254 F.2d 23 (8th Cir. 1958) 14

U.S. ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) 15

United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944) 16

United States v. Abilene & Southern Ry. Co., 265 U.S. 274 (1924) 14

United States v. Baker, Cr. No. 39-66 (D.D.C. 1967), appeal pending, No. 21154 (D.C. Cir.) 18-19

United States v. Black, Cr. Nos. 551-63 and 650-63 (D.D.C.) 8, 9, 10

United States v. Coplon, 185 F.2d 629 (2d Cir. 1950) . 14, 16, 17, 20

United States v. Cotton Valley Operators Cttee., 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950) 15

United States v. Drew, Cr. No. 1333, U.S. District Court for the District of Nevada 8

United States v. Napela, 28 F.2d 898, 903 (N.D.N.Y. 1928) 4

United States v. Nesline, Cr. No. 536-65 (D.D.C.) 9-10

United States v. Robel, 389 U.S. 258 (1967) 15

United States v. Wade, 388 U.S. 218, 240 (1967) 14

Warden v. Hayden, 387 U.S. 294 (1967) 20

Weeks v. United States, 232 U.S. 383 (1914) 4

Wong Sun v. United States, 371 U.S. 471 (1963) 4, 8

Zimmerman v. Poindexter, 74 F.Supp. 933 (D. Hawaii 1947) ... 16

STATUTES AND RULES

5 U.S.C. § 22 (1964 ed., repealed) 16

5 U.S.C. § 301 16

18 U.S.C. § 371 1

18 U.S.C. § 875(c) 1

Rule 16(a)(1), F.R.Crim.P. 3

Rule 16(e), F.R.Crim.P. 16

Rule 41(e), F.R.Crim.P. 5

Rule 44(b), F.R.Civ.P. 14

Rule 44(a)(1), F.R.Civ.P. 14

ARTICLES AND TREATISES

Advisory Committee Notes to Federal Rules of Criminal Procedure, 39 F.R.D. 176 3

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1175 (1960) 18

H. Rep. No. 1461, 85th Cong., 2d Sess., March 6, 1958 16

5 Wigmore, *Evidence*, § 1367 (3d ed. 1940) 13

6 Wigmore, *Evidence*, § 1834 (3d ed. 1940) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN, and
FELIX ANTONIO ALDERISIO, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

ON MOTION TO MODIFY THE ORDER OF THE COURT

BRIEF FOR PETITIONERS

This brief is intended as a definitive statement of petitioners' position, designed to assist the Court by placing together the contentions and arguments raised by the eight pleadings filed by the parties since the denial of certiorari.

STATEMENT OF THE CASE

This case arose on conviction of petitioners on one count of a two count indictment for conspiracy, 18 U.S.C. § 371, to transmit murderous threats in interstate commerce, 18 U.S.C. § 875(c). The petitioners were acquitted on the second count. Following affirmance of the convictions by the United States Court of Appeals for the Tenth Circuit, petitioners sought and were denied the writ of certiorari from this Court. They then filed a petition for rehearing alleging that counsel had reason to believe that petitioner Alderisio's

conversations were monitored through illegal electronic surveillance at Alderisio's place of business in Chicago. The Solicitor General tacitly admitted the illegality, but said that an examination by Department of Justice personnel had turned up nothing in the materials which was "arguably relevant" to this prosecution, and that, therefore, disclosure of the illegally-obtained materials should not be ordered.

This Court granted rehearing, granted the petition for a writ of certiorari, vacated the judgment of the Court of Appeals, and remanded the cause for a hearing on the relevancy of the overheard conversations to petitioner's conviction. *Kolod v. United States*, 390 U.S. 136 (1968).

The Solicitor General promptly filed a motion to modify the Court's order. In his motion, which has been set for oral argument, the Solicitor General concedes that the Department of Justice must now disclose to *someone* the existence and fruits of any illegal electronic surveillance in every criminal case. In his response to the petitioners' opposition to his motion, the Solicitor said that disclosure is not to be limited to the logs of the illegally-monitored conversations themselves, although he did not specify—and could not well have specified—just how far beyond the logs disclosure should go.[1]

The Solicitor General insisted, however, that disclosure should in the first instance be made to the district judge *ex parte*[2] and *in camera*, leaving it to him to decide whether to deny relief out of hand or to order further proceedings of an adversary character. Petitioners contend that this suggested procedure is almost ludicrously unsuited to its purported purpose of vindicating the fourth amendment

[1] Not presented by this record is the question of what disclosure should be made and what hearing held in the event that electronic surveillance has been conducted which the government wishes to claim is not unlawful. Resolution of the question before the Court in this case may, however, shed some light upon this closely related field.

[2] "*Ex parte*" in the sense that the safeguards provided by adversary inquiry would be lacking. See Point II, *infra*.

rights concededly violated here, and purging the government's case of taint. First, petitioners have a fourth and fifth amendment right to disclosure of the overheard materials, in whatever form they were transcribed and in the form or forms into which they were subsequently molded for use in the investigative process. Second, the government's position would sweep aside in cases involving illegal surveillance the hard lesson that adversary inquiry is the best means to the whole truth when facts are in dispute, and that *in camera* and non-adversary proceedings are conducive to the suppression of truth. Third, the government has no legitimate interest which would be protected by nondisclosure; nor can it invoke upon behalf of its argument legitimate interests of others which are unamenable to protection by means other than nondisclosure. Finally, the functional and practical limits upon the fact-finding ability of trial judges, as shown in case after case, should make one highly suspect of shortcuts to decision.

I. The Fourth and Fifth Amendments Demand Disclosure.

This Court left open in *Clewis v. Texas*, 386 U.S. 707, 712 n.8 (1967), the question whether disclosure of a criminal defendant's transcribed conversations in a criminal trial was a due process right. Where a claim of illegality is involved, and the time and circumstances of the overhearing make it likely that the defendant cannot know what he said other than by disclosure, the California Supreme Court has held disclosure required by due process. *People v. Cartier*, 51 Cal.2d 590, 335 P.2d 114 (1959). The Advisory Committee on the criminal rules has similarly suggested that due process may be in issue when disclosure is sought under Federal Rule of Criminal Procedure 16(a)(1), 39 F.R.D. at 176. If necessary to the disposition of this case, this Court should, we submit, recognize that the ability of illegality's victims to defend themselves requires disclosure. In Section IV of this brief, it may be seen from the facts of contemporary litigation why this is so. However, even without examination

of the practical considerations which underlie decisions on whether "the law of the land" compels this result, the fourth amendment clearly does.

This Court for long took the view that the spoken word was outside the protection of the fourth amendment, as not being "papers" or "effects". *Olmstead v. United States*, 277 U.S. 438 (1928). This view has now been overruled. See *Berger v. New York*, 388 U.S. 41 (1967). But its demise was settled in *Irvine v. California*, 347 U.S. 128 (1954); *Silverman v. United States*, 365 U.S. 505 (1961); and *Wong Sun v. United States*, 371 U.S. 471 (1963).

If words and conversations, the stuff of private thoughts, are to be protected by the fourth amendment, one cannot rationally distinguish, at the point of enforcing the protection, between the concededly unlawful search for tangibles and that for intangibles. If the EBI had ransacked petitioner Alderisio's home, and taken his private papers without warrant or other process, could it decline to produce them in court for return to Alderisio upon the assertion that they were not the basis for any pending criminal charge? Could the FBI retain the papers for leisurely perusal in the pursuit of some ill-defined governmental interest in investigation and detection of crime? Clearly not, for the return of property seized has been an historic corollary of a finding of illegal search, save only where the property was contraband or subject to forfeiture as the fruits or instrumentalities of crime,[3] and, even then, the issue may be litigated in an adversary proceeding for return of the property. It is not only the right to be free from oppressive and unlawfully-devised *prosecution* that the fourth amendment was designed to protect. Indeed, explicit recognition of the right to suppress evidence came late in the federal law, *Weeks v. United States*, 232 U.S. 383 (1914), and even later as a principle of decision applicable to the states as a matter of due process, *Mapp v. Ohio*, 367 U.S. 643 (1961). Rather, it is the

[3] *United States v. Napela*, 28 F.2d 898, 903 (N.D.N.Y. 1928).

"right to be let alone—the most comprehensive of rights and the right most valued by civilized men" that "the makers of our constitution" sought to protect. *Olmstead v. United States*, 277 U.S. 438, 478 (1928). And whether it be the claim of a dissentient bookseller, *Stanford v. Texas*, 379 U.S. 476 (1965), or the right of petitioners here, the return of that stolen under color of law is an indispensable means of honoring the fourth amendment's great object.[4]

The Solicitor General has not yet come to terms with this body of law, maintaining in the last pleading filed with this Court, Reply Memorandum for the United States, pp. 2-3, that relevance to a pending prosecution is the decisive issue in determining whether the government must return materials seized in a search found or conceded to be unlawful. The law, as we have shown, is otherwise.

Nor may one forget that the prevalence of officially-sponsored electronic invasions of privacy has become a matter of public concern. From the evidence so far in, this concern is warranted. Only last month, the government's lawyers filed a "Motion for Continuance" in *Attorney General v. W.E.B. DuBois Clubs of America*, No. 127-66, pending before the Subversive Activities Control Board, asking that that proceeding be stayed until this Court's ruling on the Solicitor General's motion. This Court's ruling, the government said, would enable it to determine "whether and on what basis it will go forward with the case against the W.E.B. DuBois Clubs of America." This is, of course, but one example, indicative of the breadth of the government's activity, and the ease with which electronic surveillance may impinge on political thought and activity.[5] The Solicitor

---

[4] The mandatory return of property provisions of F.R.Crim.P. 41(e) carry this right into contemporary practice.

[5] Another indication was the government's statement, in its continuance motion, that the *DuBois Clubs* case involved "national security", a term which is apparently infinitely expansible and liable to be invoked at any moment to work a *pro tanto* suspension of the fourth amendment.

General would deny to all victims of surveillance the materials taken from them until a judge, in the privacy of his chambers and uninformed by facts developed in the process of adversary inquiry, found that the material taken was relevant to a pending proceeding. In the meantime, of course, the unlawfully-obtained materials, not only from this surveillance but from many another, would be in government hands, and every citizen knows it. Every citizen knows, too, that if he is the victim tomorrow, or next week, he will have no redress, no way of knowing which of his private conversations has been overheard, unless he should someday be visited by a "relevant" criminal prosecution. Called to mind is Justice Jackson's observation upon the fourth amendment:

> "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror into every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (dissent).

The feared existence of secret government files based on invasions of our innermost private actions and thoughts is often the prelude to political blackmail and coercion.

With commendable candor, the government has in case after case come forward to admit illegal surveillance. But one should not in praising the government for its candor overlook what has come to be a far more important aspect of the government's fourth amendment theory—its implicit claim that it has the right to retain the fruits of illegal surveillance for purposes other than "relevant" prosecution.

This theory confounds the remedy—suppression of evidence for use in criminal prosecution—with the right, the basic and unalterable right, to be free of unreasonable search and seizure, and therefore cannot withstand the briefest of examination.

II. The Proposed Hearing Procedure Is Constitutionally Defective

A. Introduction

The government proposes initially to submit the monitored material to the district judge *in camera*, no doubt through its attorneys. The materials will apparently contain little more than the monitored conversations themselves since the *Schipani* review which the Department of Justice has carried out to date has been limited to such an analysis. As the Solicitor General stated in his Memorandum in Opposition to the Petition for Rehearing herein, the Attorney General's

> "committee has followed the precept that a conversation of a defendant overheard by such means shall be disclosed to the appropriate court if arguably relevant to the litigation involved." Memorandum in Opposition, p.5.

Under the pressure of an adversary proceeding herein, the Solicitor General has enlarged the area of consideration to "memoranda that reflect any illegal electronic surveillance," Reply Brief on the Motion to Modify, p.2 n.1. The term "reflect", however, has no present legal meaning and has little chance of obtaining one *in camera*. This simplistic approach to the problem of "relevance" will not begin to cover the complexity of the government's electronic surveillance schemes as they have already been disclosed in courts of law.

At the outset, the government apparently assumes that all *leads* from conversations picked up over an electronic device are clearly identifiable as such and will concern the

same subject matter as the conversation itself. This is manifestly not the case. See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Smith v. United States*, 344 F.2d 545 (D.C. Cir. 1965). The change in character and subject matter of the investigative leads and the mixing of information from many sources is most likely to take place in the type of investigations conducted by the FBI with the aid of electronic devices. Many such investigations were "intelligence type investigations" where no particular violation of federal law was being pursued.[6] Moreover, one of the FBI procedures in such an investigation is to build dossiers on the names of associates of the investigative target.[7] Thus the

---

[6]See, for example, testimony dealing with electronic surveillance given by Dean Elson, Special Agent in Charge of the Las Vegas Field Office of the FBI in the case of *United States v. Drew*, Cr. No. 1333, United States District Court for the District of Nevada, Transcript of Testimony before the Honorable Judge Rodger T. Foley, February 1968, p. 749:

> "Q: Apparently that has some connotation that I may not fully grasp, Mr. Elson; do you want to explain really what you mean by that, an intelligence type investigation?
>
> "A. We were interested in Mr. Drew from the standpoint of his activities, his associates, who he was contacting in connection with organized crime and organized criminal activity. Our primary objective in the investigation was intelligence information just as it is in an espionage investigation.
>
> There was no – at this stage of the investigation there is no violation within the jurisdiction of the Bureau. It was purely an intelligence type of an investigation."

[7]For example, see the testimony of Special Agent Pennypacker of the FBI in *United States v. Black*, Cr. Nos. 551-63, 650-63, United States District Court for the District of Columbia, Transcript of proceedings before the Honorable Judge William Jones, December 18, 1967, p. 610:

> "[d]uring the course of the investigation I might send a lead out to an office and make reference to the fact previously it had been determined from several sources. One of the sources would be microphone surveillance, that a given named individual had been associated with Mr. Black, because this was my area of investigation, to determine who this individual was. Consequently the source of my information to determine who this individual was would be for from several sources includ-

mere mention of a name over the device may lead to a dossier on that person and his relationship to the target on subject matters unrelated to the conversation heard over the device. If these new matters are relevant to a later prosecution, analysis of the microphone logs will never reveal it.

Further complicating the issue of any *in camera* inspection by the trial judge is the simple difficulty in identifying the illegally seized material and leads therefrom once they have been commingled with other information in the investigative files without the assistance of live witnesses. Consider the following colloquy between FBI Agent George Benjamin, Supervisor of the *Black* case in the FBI Headquarters in Washington, D.C. and attorney Thomas A. Wadden, Jr.:

> "Q. Would you be able to tell by inspecting an air-tel [internal FBI memorandum] whether the information in the air-tel emanated from the illegal bug?
>
> A. Not always, sir. And I will explain that.
>
> Q. Please do.
>
> A. In many instances it will have a paragraph similar to the one you just showed me, 'a confidential informant advised', or something similar to that. I have no way of knowing what kind of an informant that is."
>
> *United States v. Black*, Cr. Nos. 551-63 and 650-63 (D.D.C.), pending, T.645, Dec. 19, 1967.

The same dissimulation with respect to the origins of information and the same mixing up of lawful with unlawful materials were shown to have occurred as well in *United*

---

ing this microphone surveillance, and it would become commingled with other information. My purpose in sending leads out in the first place would be to identify individuals which I had no identity for or I wanted to get additional background and we had a large number of people we had not identified up to that point, so it would be a situation where I would be affixious and interested."

States v. Nesline, Cr. No. 536-65 (D.D.C.), T.203-05, 260-62, June 29-30, 1967.

A further issue which no judge could decide *in camera* is the relationship of the illegally seized material and leads therefrom to the decision-making process as it affects the progress of the criminal investigation. For example, Mr. Benjamin also testified in the *Black* hearing:

> "THE COURT * * * It is always possible, is it not, Mr. Benjamin, to get your entire Black file on short notice? It is all there together?
>
> A. Yes, sir.
>
> BY MR. WADDEN:
>
> Q. Mr. Benjamin, is the bug material, that is, the information received from the bug, segregated in the file from the information lawfully gotten?
>
> A. No, sir.
>
> * * * *
>
> Q. As the supervisor, in determining what further steps should be taken in an investigation, do you use the total information contained in the case file?
>
> A. Yes, sir."
>
> *Id.* at T.671.

Failure to analyze all of the relevant data in an adversary proceeding has already led to misleading statements before this Court in the *Black* case. The Solicitor General stated to this Court in May 1966 that the FBI investigation which led to the electronic surveillance on Fred Black at the Sheraton Carlton Hotel in Washington "was unrelated to the tax-evasion case" on which Mr. Black was convicted. In addition, at the hearing on remand, the prosecutor stated: "The Federal Bureau of Investigation couldn't have cared less about Mr. Black's tax case." Nevertheless secondary memoranda developing leads from the Black surveillance which were turned over thereafter revealed that the FBI had a deep interest in the tax case to the point that the Kansas City

Office was directed to identify all the witnesses appearing before the *Black* grand jury which returned the tax indictment.[8] Either those attorneys making the representations did not have all the facts or they had an "advocate's" interpretation of the facts not shared by defense counsel.

Finally, the Internal Revenue Service method of electronic surveillance is even less susceptible to *in camera* judicial resolution. The record in *McGarry v. United States,* No. 1184, October Term 1967, Supreme Court of the United States, which is now pending before this Court on petition for writ of certiorari, sets forth the IRS system of the early 1960's. Mr. Owen Burke Yung conducted one of many wiretaps in Miami, Florida on a gambling suspect. The tape recordings were sent to him in Washington. After listening to them he would telephone information to the relevant field men conducting investigations. Yung made no records. He erased the tapes after he had passed on all the information. He did not tell the field men where he got the information. Wiretap admissions by the Department of Justice are now based on Mr. Yung's questionable memory of "thousands of voices" heard three and four years ago. See Petition for Writ of Certiorari, *McGarry v. United States, supra,* pp. 4-10; Typed Transcript of Testimony of Owen Burke Yung, pp.109-53, before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, April 4, 1967. How, then, does the United States propose an *in camera* proceeding in this situation? Will the trial judge conduct a cross-examination of Mr. Yung in chambers without the defendant or his counsel present?

Altogether, these examples taken from the records of existing cases demonstrate how totally inadequate the procedure proposed by the government is to handle the reality

---

[8]This issue and the relevant citations are more fully set forth and developed in petitioner's Motion for Leave to File Reply Memorandum to Memorandum of the United States in Opposition, pp. 4-8, filed herein.

of what has already taken place in the past.[9] Moreover, if any agency of government has the temerity to engage in any similar activity in the future, it will undoubtedly design its program to evade the simplistic *in camera* solution now proposed by the United States. The only way to tell what has happened to illegally overheard conversations is to ask the men who took that material and put it into the government's files. And when questions are to be asked, and answers to be sought, fundamental constitutional guarantees come automatically into play.

B. The Constitutional Mandate of Adversary Inquiry

A suppression hearing is part of a criminal trial. *DiBella v. United States*, 369 U.S. 121, 131 (1961). Even if it were not, the values of public trial, confrontation, cross-examination and the assistance of counsel would be indispensable means to assure a just result and a fair inquiry. But these rights, which every party in a civil proceeding may claim as a matter of common law—and perhaps of due process—have by the sixth amendment been made a constitutional requirement on the criminal side of the courts—or at any time when punishment is the object sought. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

When the men who overheard petitioners' conversations are haled into court to explain what they did with the logs of monitored conversations, and when they are examined under oath, petitioner will have the following safeguards:

---

[9] The examples also show that, without adversary inquiry, one can never be sure the government has turned over all memoranda which "reflect" illegal surveillance. The government's actual surveillance techniques seek to ensure that the illegal source of the material is reflected in neither the designation nor the contents of memoranda based on illegally-obtained materials.

1. *Public Trial*

If the agents must testify in public, they are much less likely to lie or to be mistaken about important details. *In Re Oliver*, 333 U.S. 286 (1948), definitively sets out the policy behind the public trial, and its rationale governs this case. The agents testifying in public are subject to correction by those who hear them testify. Petitioners or others, their recollection refreshed by disclosure of the logs, will be able to come forward and claim that what the agents claim to have heard at a given time and place is not all that was spoken, and that the story the agents tell does not adequately describe the extent of their surveillance. These benefits, these checks on veracity are not fanciful justifications for an abstract albeit practically unimportant right. History recites that the right to public trial vindicates itself time after time as its theoretical benefits are shown to be real. See examples cited at 6 Wigmore, *Evidence*, § 1834 (3d ed. 1940).

2. *Cross-examination and Confrontation*

Cross-examination is "the greatest legal engine ever invented for the discovery of truth" and "the great and permanent contribution of Anglo-American system of law to improved methods of trial procedure. 5 Wigmore, *Evidence*, § 1367, at 29 (3d ed. 1940).

In the decisions of this Court, *e.g.*, *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); it has been declared to be a right so fundamental as to be secured from invasion by the states under the rubric of the due process clause.

It is not only placing the agent[10] subject to questioning that gives cross-examination its value; it is placing him under

---

[10]Indeed, the government attorneys who would presumably make the turnover to the district judge would not in any trial or proceeding even be competent foundation witnesses to establish the authenticity or custody of the documents they would present. See *Lambeck v. United States Shipping Bd. Emer. Fleet Corp.*, 9 F.2d 558, 559 (2d

questioning by counsel for the defense, who alone has the motive of showing his statements to be inaccurate, incomplete, or one-sided. No judge, however well-intentioned, can play this role. *Cf. Dennis v. United States,* 384 U.S. 855, 875 (1966). Moreover, since the government has the burden of purging its case, *United States v. Wade,* 388 U.S. 218, 240 (1967); *United States v. Coplon,* 185 F.2d 629 (2d Cir. 1950), it is difficult to see how the untested and hearsay observations of agents, contained in documents turned over under government supervision, can be said to fulfill that role.[11]

3. *Assistance of Counsel*

Closely related to the right of cross-examination is the right to assistance of counsel. Handicapping counsel from protecting his client's interest by procedural restrictions such as *in camera* and non-adversary proceedings is an effective denial of that right, not unlike denial of an opportunity to become acquainted with the facts of the case prior to trial. See, *e.g., Tinkle v. United States,* 254 F.2d 23 (8th Cir. 1958).

III. No Countervailing Need for Secrecy.

The government adduces vague references to "arrant gossip" and the "inner workings" of the investigative process in support of its demand for *in camera* and *ex parte* proceedings.

Cir. 1925) (stating rule). *Cf.* F.R.Civ.P. 44(a)(1). Given the concealment of illegality by means of symbols such as "confidential informant", a statement such as that contemplated by F.R.Civ.P. 44(b) that the turnover included all logs and other materials would be of no evidentiary value whatever. Of course, under the Solicitor General's proposed procedure, the defendants would not be permitted even to see and challenge the authentication.

[11] Even in administrative proceedings, this Court has held that withholding matters used as a basis for decision violates due process. *United States v. Abilene & Southern Ry. Co.,* 265 U.S. 274 (1924) (Brandeis, J.).

The "arrant gossip" rationale is quickly disposed of if we consider that the petitioners themselves either heard or made the "scandalous references" to third parties contained in the surveillance logs. So there is no justification for withholding the information from petitioners. The rights of third parties can, moreover, be protected with appropriate orders. The Solicitor General and petitioners have brought to the Court's attention instances where protective orders have not sufficed. Not recounted are the thousands of instances in which they have, in civil and criminal litigation. Moreover, counsel for petitioners have consistently urged, in cases in which they have been involved, that whenever a "leak" develops that the judge concerned initiate an investigation and that the protective order be enforced by vigorous use of the contempt power. After all, it is the privacy of criminal defendants as well as third parties which is sought to be protected. This Court has held in another and related context that fundamental freedoms are not to be held out for sacrifice without full exploration of alternative means of dealing with the evils their exercise gives rise to. *United States v. Robel*, 389 U.S. 258 (1967).

The Solicitor General also advances as a rationale that the inner workings of the investigative process would be disclosed if turnover were made as the petitioners contend it should be. This contention does not find warrant in any relevant regulation or statute.[12] If it be seen as a restatement of the

---

[12]In the past, the Department has claimed the power to keep its internal files confidential and free from judicial scrutiny. In *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), this Court held that a regulation which required all demands for Department of Justice papers to be referred to the Attorney General was a valid "housekeeping" provision. The Court expressly declined to decide the validity of that portion of the regulation declaring all Department files confidential. The question left open in *Touhy* may be regarded as closed by the holding in *Reynolds*, *supra*, and in criminal cases the question is indisputably settled by *Roviaro v. United States*, 353 U.S. 53 (1957). See also *United States v. Cotton Valley Operators Cttee.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940

federal decisional law of privilege for the investigative files of government it is inapposite when the government (1) has conceded the illegality of its conduct, (2) is nonetheless attempting to put the petitioners in jail for substantial periods of time, (3) is pleading for secrecy with respect to the fruits of illegality and, (4) is making a disputed contention that the illegality did not taint the petitioners' conviction. *United States v. Coplon*, 185 F.2d 629, 636-40 (2d Cir. 1950), cited with approval on this very point in *Dennis v. United States*, 384 U.S. 855, 873, n. 20 (1966), *cf. Zimmerman v. Poindexter*, 74 F. Supp. 933 (D. Hawaii 1947).[13]

Indeed, the rationale of *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944), cited with approval in *Dennis*, 384 U.S. 53 (1957), dictates that, unless the government is willing to open its files to the extent necessary to ensure, through adversary proceedings in open court, that its unlawful conduct did not produce leads or evidence which contributed to petitioners' convictions, these cases must be dismissed.

This view of governmental privilege in this context also disposes of the Solicitor General's reliance upon Jencks Act cases such as *Palermo v. United States*, 360 U.S. 343 (1959), and the provisions of Rule 16(e), Federal Rules of Criminal

---

(1950). Moreover, the Attorney General's regulations no longer declare Department files confidential, see Dept. of Justice Order No. 381-67, 32 Fed. Reg. 9662 (1967), and indeed could not do so under the statutory authorization for the regulaton, 5 U.S.C. § 301. § 301 expressly provides that it "does not authorize withholding information from the public." The predecessor section, 5 U.S.C. § 22 (1964 ed. repealed), containing the same language, was expressly designed to correct a situation in which "every file clerk [had] become a censor." H.Rep. No. 1461, 85th Cong., 2d Sess., March 6, 1958, set forth in full at 1958 U.S. Code Cong. & Adm. News 3358, 3359. Thus, there is no conceivable statutory or administrative regulation support for the Solicitor's position.

[13] See *Campbell v. Eastland*, 307 F.2d 478, 486 (5th Cir. 1962) (executive privilege "narrowly confined to matters affecting the national security").

Procedure. Jencks Act disclosures involve statements of witnesses interviewed by government agents; the witnesses are not parties to the litigation in which the statements are produced, and the investigative techniques leading to the taking of the statements are as a general rule lawful. Thus, the claim of the government to the privacy of its investigative files is the strongest possible. So also with discovery of the government's evidence under Rule 16. Here, however, the materials in question were obtained from a criminal defendant by means concededly unlawful.

Moreover, the claim that investigative files reflecting lawful techniques should be kept free of scrutiny could be more sympathetically received if experience showed that the government consistently and carefully separated illegally-gathered material from that legally-gathered, to permit easy identification of the source of any given communication or item of intelligence. The evidence demonstrates that, on the contrary, the government mixes up lawful and unlawful in its files, thus by its own conduct reinforcing the need for the kind of inquiry petitioners submit the constitution demands. Moreover, the investigative techniques so assiduously sought to be protected from petitioners' view have already been compromised by disclosures of illegality in dozens of cases.

IV. What Kind of Hearing?

The courts have by now had much experience with hearings on illegal electronic surveillance, and many questions were answered by Learned Hand in *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), cited with approval on the issue of turnover of logs, *Dennis v. United States*, 384 U.S. 855, 873, n. 20 (1966). Judge Hand admonished against accepting any government assurances other than those backed up with proof in open court. More than precedent underlies petitioners' claim, however.

Consider the average criminal case, in which the government would disclose surveillance material *in camera* in advance of trial. The trial judge reviews the mass of material, and compares it with the indictment. But the indictment is in such summary form as to be totally useless to the task the Solicitor General would have the judge perform. See, *e.g.*, Forms 1-10, Federal Rules of Criminal Procedure; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1175 (1960); or the typical tax evasion case in which the indictment is limited to the words of the statute and a dollar amount allegedly evaded, not at all signalling the tortuous path which proof will likely take at trial. See *Holland v. United States*, 348 U.S. 121 (1954). The judge can look at the grand jury testimony, of course, but he may not find anything there either because the government has resorted to the device of putting in a skeleton case consisting entirely of hearsay, *Costello v. United States*, 350 U.S. 359 (1956), or it is so massive that no judge has the time to read it. The bill of particulars is of little more help.

Finally, and most dramatically, the judge cannot know how the case will develop at trial, and particularly he cannot know what the government will want to use in cross-examining defense witnesses. An example of this occurred in the recent case of *United States v. Baker*, Cr. No. 39-66 (D.D.C. 1967), appeal pending, No. 21154 (D.C. Cir.). At the trial of that case, the government sought to prove that the defendant had stolen a large amount of money. The defendant claimed that he had picked up the money in Washington, D.C. on October 31, 1962, and had delivered it to the intended recipient in Washington on November 5. On cross-examination, the government elicited from the defendant for the first time the statement that he had been to Los Angeles the intervening weekend of November 2 through 4. The government then brought out that the defendant had taken a side trip to Las Vegas from Los Angeles and hammered the charge home to the jury to impress them that the defendant had gone to the gambling capital of the world.

Defense counsel brought to the court's attention that in an illegally-overheard conversation, the transcript of which had been given to the defense, the information that the defendant was going to Las Vegas that weekend unmistakably appeared. The trial judge struck out the testimony. Appellant's opening brief, pp. 78-80. How, one may ask, could a trial judge have kept in his memory all the illegally-overheard conversations so as to be able to pick that one – apparently totally unrelated to the facts of the case before him – out at the appropriate moment to consider informing the defense that he would entertain an objection to the proffered line of testimony or evidence? If it is enough for judges to judge in assessing the producibility of grand jury minutes, *Dennis, supra,* at 875, how much more is it enough for them to do so in the evaluation of a mass of electronically-obtained material together with leads and other evidence thereby obtained? At least when reading over grand jury minutes, the judge can look at the testimony of one witness at a time, while the Solicitor General's proposed procedure for electronic surveillance cases provides him no such luxury.

The answer is, of course, that due process of law cannot be made to turn upon the retentive powers of trial judges. Moreover, given the sketchy evidence of the government's proposed proof prior to most trials, the Solicitor's procedure would force postponement of the really important suppression issues until trial, contrary to the spirit and intention of Rule 41(e). *Battle v. United States*, 345 F.2d 438 (D.C. Cir. 1965). Petitioners suggest that the law governing suppression hearings may be restated as follows: The government has an initial burden to come forward with an admission that illegal surveillance has taken place. *Kolod v. United States,* 390 U.S. 136 (1968). The Solicitor General has admitted having this burden not only in this case, but by his response to the Motion to Amend the Petition for Certiorari in *Ivanov v. United States,* No. 885, October Term 1967. Prior to trial, the government has the risk of non-persuasion that its case against the defendant is not tainted by direct or indirect use of the logs of ille-

gally-monitored conversations or the leads gained by their use. In practice, the defendant will have the burden of going forward, to suggest avenues of inquiry, points of possible coincidence between the government's case and the illegal material, and "causal connection" between the illegality and the case against him. This is a task for open hearing and not for summary procedures, for the proof is largely in the hands of the government and "hostile witnesses thicken the plot". *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). And see *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Garrett Biblical Institute v. American University*, 163 F.2d 265 (D.C. Cir. 1947). To similar effect is *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950).

But just as the trial judge cannot possibly know just what will become relevant at trial, the defendant will need to be vigilant. With logs and summaries of the illegally-obtained material, with the memoranda which adversary inquiry has shown were in fact derived from it, and with the transcript of the pretrial hearing, his counsel must be alert to detect and protest apparent further use of the materials by the government during trial. Is such a procedure unduly complicated? On the contrary, petitioners respectfully suggest that it is the minimum commanded by the fourth amendment's guarantee against unreasonable searches, the fifth amendment's promise of due process, and the sixth amendment fair trial provisions, including especially cross-examination and the effective assistance of counsel.

CONCLUSION

This Court has only recently reaffirmed, in departing from the common law concept that protection of men in their property was the purpose of the fourth amendment, that security of one's home and person from unreasonable search is a means of ensuring privacy and dignity. *Warden v. Hayden*, 387 U.S. 294 (1967). The means here used to invade privacy and sap dignity – compared to which the writs of

assistance were "but puny instruments of tyranny", *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (dissent) – are those most calculated to induce upon the part of the populace a sense of governmental ubiquity utterly at odds with the self-confident and self-reliant spirit of a free people.

At the root of this case, therefore, is a fundamental question about the way we are to live our lives. Is it enough for the government to say, even with the approval of a district judge, "There has been a faceless informant behind your walls, recording your every private conversation. But you needn't worry. Nothing really significant – at least to *this* case – was turned up."? Petitioners respectfully suggest not, and ask the Court to deny the Solicitor General's motion and to remand this case with instructions that a free and open inquiry be held.

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
PETER R. TAFT
MICHAEL E. TIGAR
1000 Hill Building,
Washington, D.C. 20006
Counsel for Petitioners

Of Counsel:

WILLIAM P. JOHNSON
DONALD L. GIACOMINI
Security Life Building
Denver, Colorado 80202

W. H. ERICKSON
First National Bank Building
Denver, Colorado 80202